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BEFORE THE ARIZONA CORPORATION COMMISSION

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2010 JUN 29 P 4: 26

Arizona Corporation Commission

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JUN 29 2010

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In the matter of:

MICHAEL T. BELL, a single man

SHAWN R. SALAZAR, a married man

ADAMAS INVESTMENTS, LLC, a Nevada
limited liability company

Respondents.

DOCKET NO. S-20707A-09-0498

SECURITIES DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY

(Assigned to the Honorable Marc E. Stern)

The Securities Division ("the Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of California residents Flo Morris, Jack Brown and Gregory Heffron during the hearing on this matter scheduled to begin on July 6, 2010. Ms. Morris, Mr. Brown, and Mr. Heffron will provide relevant testimony at the hearing; however, special circumstances prevent their actual, physical appearance in Phoenix, Arizona at that time. For this reason and others addressed in the following Memorandum of Points and Authorities, the Division's Motion to Allow Telephonic Testimony should be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Division anticipates calling Ms. Morris, Mr. Brown, and Mr. Heffron as essential witnesses at the hearing. All three individuals can and will offer highly probative testimony in support of the allegations brought by the Division in this matter. In fact, Mr. Heffron is also listed on the respondents' list of witnesses for the hearing. Ms. Morris, Mr. Brown, and Mr. Heffron all

1 reside in California. As such, the burdensome task of traveling to Phoenix to provide testimony in
2 person is impractical and the simple, well-recognized solution to this problem is to allow for
3 telephonic testimony. This will ensure the preservation and introduction of relevant evidence and
4 all parties will have a full opportunity to question the witness, whether by direct or cross-
5 examination.

6 **II. ARGUMENT**

7 **A. *Telephonic Testimony in Administrative Hearings is Supported Both*** 8 ***Under Applicable Administrative Rules and through Court Decisions***

9 The purpose of administrative proceedings is to provide for the fair, speedy, and cost
10 effective resolution of administratively justiciable matters. To effectuate that purpose, the
11 legislature provided for streamlined proceedings and relaxed application of the formal rules of
12 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of
13 contested administrative cases. The evidence submitted in an administrative hearing need not
14 rise to the level of formality required in a judicial proceeding as long as it is “substantial, reliable
15 and probative.” In addition, the Commission promulgated rules of practice and procedure to
16 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*
17 A.A.C. R14-3-101(B); R14-3-109(K).

18 Pursuant to A.A.C. R2-19-114, an administrative law judge (“ALJ”) may grant a motion for
19 telephonic testimony if 1) personal attendance by a witness will present an undue hardship; 2)
20 telephonic testimony will not cause undue prejudice to any party; and, 3) the proponent of the
21 telephonic testimony pays for the cost of obtaining the testimony telephonically. Allowing Ms.
22 Morris, Mr. Brown, and Mr. Heffron to testify by telephone will not cause undue prejudice to any
23 party as it retains all indicia of reliability and preserves Respondents’ right to cross-examination.

24 Consistent with these administrative rules, courts have routinely acknowledged that
25 telephonic testimony in administrative proceedings is permissible and consistent with the
26 requirements of procedural due process. *See* A.A.C. R2-19-114. In *T.W.M. Custom Framing v.*

1 *Industrial Commission of Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged the
2 validity of an ALJ's judgment partly on the fact that the ALJ had allowed two of the Industrial
3 Commission's witnesses to appear telephonically. The Court initially noted that telephonic
4 testimony was superior to a mere transcription of testimony because the telephonic medium
5 "preserves paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in
6 making determinations of credibility." See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court
7 then went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and
8 are charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,
9 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic
10 testimony offered in this case was fully consistent with the requirement of "substantial justice."

11 Other courts have reached similar conclusions with respect to the use of telephonic
12 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of*
13 *Industrial Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was
14 asked to review a trial court's determination that a hearing officer's admittance of an inspector's
15 telephonic testimony violated C & C's due process rights and prejudiced C & C by preventing it
16 from cross-examining the inspector's notes. The appellate court rejected the trial court's
17 conclusions, holding that 1) cross-examination was available to C & C and 2) administrative
18 hearings of this nature need not be conducted according to the technical rules relating to evidence
19 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court
20 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*
21 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the
22 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings
23 involving telephonic testimony as:

24 "a pragmatic solution, made possible by modern technology, which
25 attempts to reconcile the problem of geographically separated adversaries
26 with the core elements of a fair adversary hearing: the opportunity to
cross-examine adverse witnesses and to rebut or explain unfavorable
evidence." *Id.* at 251, 131 Cal.Rptr. at 422.

1 Based on similar reasoning, a number of other state courts have recognized that, in the
2 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and
3 consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*
4 *Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division's
5 procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238,
6 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).
7 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of
8 administrative hearings, "fundamental fairness" is not compromised through the allowance of
9 telephonic testimony.

10 The telephonic testimony request in the present case fits squarely within the tenor of these
11 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that, absent
12 undue hardship, could and would appear in a Phoenix hearing room. The prospective testimony of
13 these witnesses will be "substantial, reliable and probative," and it will meet all requirements of
14 substantial justice. In other words, evidence bearing on the outcome of this trial will not be barred
15 and Respondents will still have every opportunity to question these witnesses about their testimony
16 and/or about any exhibits discussed.

17 **B. *The Arizona Corporation Commission has a well-recognized History of***
18 ***Permitting Telephonic Testimony during the Course of Administrative Hearings***

19 In light of the relaxed evidentiary and procedural rules governing administrative hearings
20 in this state and because telephonic testimony does not jeopardize the fundamental fairness
21 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
22 telephonic testimony in its administrative hearings to introduce probative evidence. This position
23 has been borne out in a number of previous hearings. *See, e.g., In the matter of Theodore J.*
24 *Hogan & Associates, LLC et al.*, Docket No. S-20714A-09-0553; *In the matter of Edward A.*
25 *Purvis et al.*, Docket No. 20482A-06-0631; *In the matter of Yucatan Resorts, Inc. et al.*, Docket
26 *No. S-03539A-03-0000*; *In the matter of The Chamber Group et al.*, Docket No. S-03177A-98-

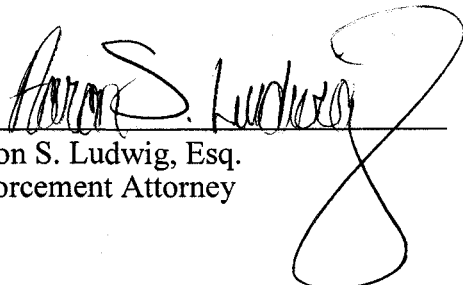
000. Consistent with past determinations in this forum, leave to introduce the telephonic testimony of these prospective witnesses is warranted.

III. CONCLUSION

Permitting Ms. Morris, Mr. Brown, and Mr. Heffron to testify telephonically at the upcoming administrative hearing allows the Division to present relevant witness evidence that is expected to be reliable and probative, is fundamentally fair, and does not compromise Respondents' due process rights. Therefore, the Division respectfully requests that its motion for leave to present such telephonic testimony be granted.

RESPECTFULLY SUBMITTED this 29th day of June 2010.

**SECURITIES DIVISION of the
ARIZONA CORPORATION COMMISSION**



Aaron S. Ludwig, Esq.
Enforcement Attorney

ORIGINAL and 8 COPIES of the foregoing filed
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The Honorable Marc E. Stern
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